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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RONALD DALEY, Plaintiff and Appellant, v. SUZANNE MEEK TOLLEFSON, Defendant and Respondent.	A105363 (San Francisco County Super. Ct. No. 967141)

Ronald Daley in propria persona appeals from the order dismissing this case for failure to prosecute, arguing that the court abused its discretion in granting the motion of Suzanne Meek Tollefson for relief from entry of default. We affirm.

I.

The original complaint herein was filed in February 1995. Appellant filed his first amended complaint on April 10, 1995, seeking damages from respondent for malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence arising out of litigation in which respondent represented the City and County of San Francisco as Deputy City Attorney. Respondent, represented herein by the San Francisco City Attorney's office, demurred to the complaint on May 15, 1995, on the ground that she was statutorily immune from liability. On May 18, 1995, appellant filed a "corrected" first amended complaint asserting the same four causes of action. On May 31, 1995, appellant filed a motion for change of venue on the ground that he had been treated unfairly by judges of the San Francisco Superior Court in prior cases. On

that date, he also apparently served a second amended complaint that added a cause of action for fraud and misrepresentation. The demurrer was taken off calendar on June 1, 1995. The court minutes for that date state: "Off calendar—1st amended x-complaint was filed on May 18, 1995."

Appellant's motion for change of venue was set for hearing on June 16, 1995, before Judge Cahill. On June 9, 1995, appellant moved to disqualify Judge Cahill for cause. At the June 16 hearing, Judge Cahill agreed with respondent's counsel, Deputy City Attorney Margarita Gutierrez, that the case was "on hold" because of the venue and disqualification motions. The judge explained: "Whoever decides this about whether I'm biased or not, looking at the declarations, then if they deny this [the disqualification motion], then it [the venue motion] will come back here, and I'll decide it. If they grant it [the disqualification motion], then there will be another judge that does it [the venue motion]." The venue motion was ordered off calendar until the disqualification motion was resolved: "The Court: So right now this is off calendar pending decision on the 170.1 challenge; right? [¶] Mr. Daley: Yes, your honor. [¶] Ms. Gutierrez: Your honor, will we receive notification of the time and date of hearing on that motion? [¶] The Court: Well, there won't necessarily be a hearing. All of the papers go to another judge, and the other judge will decide what to do." Judge Cahill advised that he would file an opposition to the disqualification motion, but he did not do so.

On September 13, 1995, appellant filed a request for entry of default with proof of service on respondent and Gutierrez, and default was entered as requested on that date. On September 27, 1995, appellant filed a status conference statement with proof of service on respondent and Gutierrez, stating that a default as to respondent had been entered. The docket entry for October 2, 1995, reads: "STCF: 10-2-95, 1:30 p.m., off-calendar, default entered."

On October 11, 1995, respondent filed an "ex parte application to resolve change of venue," consisting of a declaration from Gutierrez that stated in part:

"On September 29, 1995 I phoned the San Francisco Superior Court to inquire on the status of the [change of venue] motion before the court in this matter. I was informed by San Francisco Superior Court Clerk Jeanne Dobbs that a default had been entered against the defendant and there was no order on file pertaining to plaintiff's motion for change of venue. I informed Ms. Dobbs that a default was not proper because the defendant filed a demurrer on May 15, 1995. The court was not able to rule on defendant's demurrer because plaintiff's motion for change of venue effectively stayed all proceedings in the action." Appellant filed an opposition to the application on November 3, 1995, arguing among other things that respondent was in default and had no standing to make the application. The court never ruled on the change of venue motion.

On June 12, 1996, respondent sent appellant a letter offering to stipulate to a change of venue to Alameda County. Appellant replied by letter dated June 27, 1996, stating that a default had been entered and noting that the statutory time for challenging the entry of default had expired.[1]

Respondent moved for relief from entry of default on September 30, 1997. Gutierrez's supporting declaration stated, "[d]efendant called the court to request a ruling on the motion for change of venue because it wanted to proceed with its defense. The court informed defendant that no action had been taken, that there

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[1] Appellant wrote:

> "The eagle has landed
> The die has been cast
> Your request is belated
> Six months have long passed
> Default has been entered
> There's nothing to brief
> Only flotsom [*sic*] & jetsom [*sic*]
> Alas, no 473 relief!
> As for laches and limits
> This must then be true
> Miss Tollefson's defense has gone
> Twenty-three skidoo!"

were a variety of motions on file in the action and suggested that she file an ex parte motion in order to request a ruling." Gutierrez said she reviewed the case docket sheet on September 11, 1997, and discovered that a default judgment had been entered on October 2, 1996.[2]

At the hearing on the motion, Gutierrez elaborated on the "exparte application to resolve issue of change of venue" as follows: "I telephoned the clerk because I wanted to find out what happened on the motion to [*sic*] change of venue because I was waiting to act on this case. [¶] The clerk informed me verbally over the telephone, oh, it looks like we have a default—wait. We don't have an answer on this change of venue issue. She remembered me. She remembered what occurred at the hearing, and she said this is something you need to deal with with the court, okay? At that point, you know, I told her how can a default be entered? I have a demurrer on file. The motion for change of venue has stayed everything because I was aware of that in '95 that the motion for change of venue stayed the entire action which is why I wanted a ruling on that particular issue. [¶] At that point, she told me come in and bring the exparte application to

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[2] Had there been a default judgment, as opposed to an entry of default, the order setting it aside could not have been timely challenged in this appeal. (*Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 898 [order setting aside judgment is appealable]; *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967 [aggrieved party must appeal from appealable order]; compare *Veliscescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1522 [no appeal lies from order to vacate entry of default], *id.* at p. 1523, fn. 1 [such an order can be contested on appeal from the judgment].) The docket entry for October 2, 1996, does not show that a default judgment was entered on that date; it indicates that a case status conference was taken off calendar on that date because a default had been entered. Gutierrez also seems to have been mistaken in declaring that "there was a default prove-up of the matter" on May 16, 1997; the minutes for that date state that the matter was "dropped off calendar." Contrary to counsel's declaration below and respondent's appellate brief, it does not appear that a prove-up hearing was held or that a default judgment was entered. Respondent's brief is also incorrect in stating that Gutierrez declared that she "discovered for the first time" when she reviewed the docket "that the clerk had not removed the erroneous default from the docket"—there is no such statement in her declaration.

have the ruling on the change of venue which is exactly what I brought. It's not a motion I brought before, but it was what the clerk suggested at that point, and because we were aware that I couldn't do anything in this action until we dealt with the change of venue question."

When the court asked Gutierrez whether she had requested that the demurrer be taken off calendar, she responded, "Your honor, I can tell the court, I didn't take anything in this case off calendar. I have never wanted anything in this case taken off calendar."

The court granted the motion for relief from default by order filed October 27, 1997. In the order, the court recounted the procedural history, noting that it was "unclear what propelled the court to take the hearing on the demurrer off calendar, but that appears to have been improper. [¶] . . . [¶] . . . Whether actual notice of the request for entry of default was provided to Ms. Tollefson is disputed, as is the precise date and nature of notice of entry of default to Ms. Tollefson's attorney, Ms. Gutierrez. [¶] In addition, there was confusion regarding whether the venue motion was under submission with Judge Cahill, or had been taken off calendar. Ms. Gutierrez attempted to resolve this confusion by making an ex parte motion before Judge Cahill in November, after waiting for a ruling on what she believed was the submitted venue matter. There was no ruling on that ex parte motion. [¶] Given the series of conflicts in the various motions filed, notification provided, and disputes regarding when and whether rulings were pending or off calendar, this court orders that Defendant Tollefson is relieved from the default entered against her on September 13, 1995. The court wishes to untangle the threads of this straightforward lawsuit, so that it may be finally heard on the merits before the appropriate tribunal."

Appellant's motions for clarification of this order, and to set aside the order, were denied. In denying the motion for clarification, the court remarked that the case "was best describable as a mess."

Respondent moved in September 2003 to dismiss the case for failure to prosecute. The motion was granted by order filed in November 2003, and this appeal ensued.

II.

A court has equitable power to set aside a judgment for extrinsic fraud or mistake. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575.) Extrinsic fraud and mistake "are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342.) " 'Extrinsic mistake is found when [among other things] . . . a mistake led a court to do what it never intended . . . .' " (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) The party seeking relief from a default must generally demonstrate that it: (1) has a meritorious defense; (2) has a satisfactory excuse for failing to raise the defense sooner; and (3) was diligent in seeking to set aside the default once discovered. (*Id.* at p. 982.) Rulings on such motions are reviewed solely for abuse of discretion. (*Id.* at pp. 986-987 (dis. opn. of Baxter, J.).) Thus, we must affirm the trial court if there was any reasonable or fairly debatable justification for its decision. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

"The *filing* of a motion for change of venue . . . 'suspends the power of the trial court to act upon any other question until the motion has been determined.' " (*Moore v. Powell* (1977) 70 Cal.App.3d 583, 587 (italics added).) A motion for change of venue had been filed and not ruled upon when the default herein was entered. Accordingly, the entry of default was erroneous—an extrinsic mistake that justified relief from the default. (*Baske v. Burke* (1981) 125 Cal.App.3d 38, 44 [relief can be granted " 'for mistake made by officers of the court, at least when the mistake is of a ministerial rather than a judicial character' "]; see, e.g., *Rappleyea v. Campbell, supra,* 8 Cal.4th at pp. 979, 983 [clerk misinformed defendants as to filing fee for answer].) It was also at least arguably erroneous to

enter default after the filing of the demurrer (Code Civ. Proc., § 585, subd. (b)), even though the demurrer had been taken off calendar.

As for the first of the other conditions for equitable relief, respondent raised the meritorious defense of prosecutorial immunity. (Gov. Code, § 821.6 ["[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause"]; see, e.g., *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1436-1437; *Miller v. Hoagland* (1966) 247 Cal.App.2d 57, 62.)

As for the second condition, respondent needed no excuse for failing to raise the immunity defense because she had asserted the defense in her demurrer, which the court found was erroneously taken off calendar. This finding was correct; neither the "corrected" first amended complaint filed after the demurrer, nor the second amended complaint thereafter served, obviated a hearing on the demurrer, if only because leave of court was not obtained to amend the complaint a second time. (Code Civ. Proc., § 472.) In any event, even if respondent had been required to respond to either of these pleadings, the filing of the change of venue motion provided a sufficient justification for her failure to do so. (*Moore v. Powell, supra,* 70 Cal.App.3d at p. 587.)

As for the third condition, it was debatable whether respondent was diligent in setting aside the September 1995 entry of default. On the one hand, her application for a ruling on the change of venue motion shows that she was aware in October 1995 of the entry of default, and she did not move to set aside the default until September 1997. On the other hand, respondent promptly sought a ruling on the venue issue after the default was entered, and the court could credit her counsel's representation that she did so on the advice of the court clerk. Whether diligence was shown in these circumstances was a judgment call for the trial court, and its ruling on the matter cannot be considered an abuse of discretion. (*Gonzales v. Nork, supra,* 20 Cal.3d at p. 507.)

In further support of that conclusion, we note that appellant did not proceed to obtain a default judgment after the entry of default,[3] and he has identified no prejudice suffered as a result of respondent's delay in setting the entry of default aside. "Of the three items a defendant must show to win equitable relief from default, diligence is the most inextricably intertwined with prejudice. . . . [¶] Prejudice to a plaintiff is obviously less if judgment has not been entered when a defendant seeks equitable relief. Therefore . . . the diligence prong simply cannot assume the importance here that it would in the ordinary case wherein the trial court would be reversing a judgment and divesting a plaintiff of a property right by granting equitable relief from default. . . . [¶] Under this reduced standard, defendant[] [was] not callously derelict in seeking to set aside the default." (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p 984.)

Appellant requested a "statement of decision" on the motion to set aside the default, and he faults the trial court for failing to expressly address all of the requirements for equitable relief in its order on the motion. However, since a statement of decision is "neither required nor available upon decision of a motion" (*Lavine v. Hospital of The Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026), all necessary findings supported by the record can be implied in support of the court's determination. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) [¶] 8:24.5, p. 8-12, (rev. #1, 2003).)

[3] Indeed, he has done virtually nothing to prosecute the case other than obtaining the entry of default.

III.

The judgment is affirmed.

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Kay, P.J.

We concur:

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Reardon, J.

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Rivera, J.